

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCUS WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

April 14, 2011

No. 296864

Wayne Circuit Court

LC No. 09-031782-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCUS WILLIAMS,

Defendant-Appellant.

No. 296865

Wayne Circuit Court

LC No. 09-024964-FC

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, in each of two separate cases that were consolidated for trial. He was sentenced in each case to 180 to 270 months' imprisonment for the robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right in each case. We affirm.

Defendant's convictions arise from separate robbery incidents that were committed on the same day in the vicinity of defendant's home. Complainant Foster testified that the robber sprayed him with mace, pointed a gun at his face, and took his cell phone, phone charger, and keys. Complainant Payne testified that the robber held a gun to his head, and took his cell phone, wallet, and electronic key fob. Both victims testified that the robber was riding a reddish-colored bicycle and told them to run away as he left the scene. Both victims tentatively identified defendant in a photographic lineup and positively identified him at trial as the robber.

Defendant's sole claim on appeal is that he was denied a fair trial when the officer in charge was allowed to testify regarding how he developed defendant as a suspect. It is unclear whether defendant is claiming an error in the admission of the testimony, or misconduct by the prosecutor in eliciting the testimony. Either way, the issue is unpreserved because defendant did not object at trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Further, appellate relief is not warranted because defendant has not established a plain error affecting his substantial rights. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005); *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

MRE 402 allows the admission of relevant evidence at trial. *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). Relevant evidence is that which tends to make a material fact more or less probable. MRE 401; *People v Sabin*, 463 Mich 43, 57; 614 NW2d 888 (2000). Where evidence of other acts is relevant only because it tends to show that the defendant acted in conformity with his character, it is not admissible except as otherwise provided by MCL 768.27a and MCL 768.27b. MRE 404(b)(1); MCL 768.27. Where evidence of other acts is offered for another purpose, such as to prove motive, identity, intent, or some purpose other than character, it is admissible if the purpose for which it is offered is material to the case, MRE 404(b)(1); MCL 768.27, and its probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. "[U]nfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury or cause the jury to decide the case on an improper basis such as emotion. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989).

A prosecutor may not knowingly offer inadmissible evidence. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). Additionally, a prosecutor may not express a personal opinion regarding the defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), or "attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty" *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). However, a prosecutor is entitled to prove his case "by whatever admissible evidence he chooses." *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The defendant is only entitled to relief if an error was prejudicial. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). Thus, reversal is not required if an error could not have affected the outcome of the proceedings. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

The precise evidence to which defendant takes exception is the prosecutor's following questioning of Officer Robert Lalone regarding his development of defendant as a suspect:

Q. As a result of Mr. Payne's description of what happened to him and the description of the defendant and the description of the bicycle, were you able to, did a name come up?

A. Yes.

Q. In your investigation?

A. Yes sir, I developed Marcus Williams as a suspect.

The evidence was relevant because it explained how one of the unknown robbers was identified as a possible suspect. Contrary to defendant's argument, the evidence did not implicate MRE 404(b)(1) because it did not reveal any other acts committed by defendant. Further, the evidence did not even imply that defendant had committed some other bad acts because Officer Lalone did not mention having prior contact with defendant. Officer Lalone stated only that after receiving Payne's information, his investigation eventually focused on defendant. To the extent one might infer that Officer Lalone developed defendant as a suspect because he recognized Payne's description of the perpetrator as that of defendant, that does not imply that defendant committed any other bad acts because there is no basis for inferring that Officer Lalone's familiarity with defendant resulted from a criminal investigation of defendant. In fact, it appears that the questions and answers were intentionally vague on how Officer Lalone came to focus on defendant precisely to avoid any such implications. Likewise, the exchange is not indicative of improper conduct on the part of the prosecutor. There is nothing in the questions and answers to suggest that the prosecutor had personal knowledge of defendant's guilt or that he was attempting to use the prestige of his office to prove defendant's guilt.

Finally, even if some improper inference could be drawn from the evidence, it is highly unlikely that the error affected the outcome of the case, given that both victims testified that they were robbed by a young man with facial blemishes who was riding a reddish-colored bicycle, that defendant was a young man with facial blemishes who was found riding a reddish-colored bicycle, that both victims identified defendant as the robber in court, that defendant admitted to participating in the robbery of Foster, and that defendant was found in possession of the key fob to Payne's car. Therefore, defendant has not shown plain error affecting his substantial rights.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens